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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-90

DANIEL BURCH and WRESTLE, INC.,
Petitioners,

versus

STATE OF LOUISIANA,
Respondent.

On Writ of Certiorari to the
Supreme Court of Louisiana

BRIEF FOR THE PETITIONERS

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OPINION BELOW

The opinion of the Supreme Court of the State of Louisiana is reported at 360 So.2d 831 (1978). A printed copy is filed with the appendix to the petition for writ of certiorari.

JURISDICTION

The judgment of the Louisiana Supreme Court was entered on June 19, 1978. No application for rehearing

was filed. The petition for certiorari was filed less than ninety days later.

The jurisdiction of this court is invoked under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

Whether conviction by a non-unanimous six-person jury offends the right of persons criminally accused of non-petty offenses to the jury trial guaranteed them by the Sixth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States, Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . ."

The Constitution of the United States, Amendment XIV, Section 1: ". . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

The Constitution of the State of Louisiana, Article I, Section 17: " . . . A case in which the punishment may be confinement at hard labor or confinement without

hard labor for more than six months shall be tried before a jury of six persons, five of whom must concur to render a verdict. . . ."

Louisiana Revised Statutes 14:106: "G. Whoever commits the crime of obscenity shall be fined not less than one hundred dollars nor more than one thousand dollars, or imprisoned in the parish prison for not more than one year, or both. . . ."[1]

STATEMENT

Petitioners, an individual and a Louisiana corporation, were convicted on two counts each by a six-person jury in the Criminal District Court for the Parish of Orleans, State of Louisiana, of the crime of obscenity. The bill of information charged violation of the State Obscenity Statute, LSA R.S. 14:106, by showing obscene movies through a coin-operated picture machine in downtown New Orleans on May 24, 1977.

After the jury brought in verdicts convicting both defendants of both counts, the jury was polled and had found the defendant Burch guilty by a vote of 5 -1 and the defendant Wrestle, Inc. guilty by a unanimous verdict. Opinion, Louisiana Supreme Court, Appendix to Petition for Certiorari, pps. 2a, 11a; *State v. Wrestle, Inc., et. al.*, 360 So.2d 831, at 833, 837.

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1 Louisiana's Obscenity Statute was amended subsequent to the filing of the bill of information herein, and the pertinent part of the penalty provision now reads: "G. Whoever commits the crime of obscenity shall be fined not less than one hundred dollars nor more than one thousand dollars, or imprisoned for not more than one year with or without hard labor, or both." As amended by Acts 1977, No. 717, Sec. 1.

Burch was sentenced to serve two consecutive seven month terms in parish prison, suspended, and placed on inactive probation for two years for each count, to be served concurrently; a condition of the probation was that he pay $1,000 to the judicial expense fund. Wrestle, Inc., was sentenced to pay a fine of $600 on each count. Defendants timely appealed to the Louisiana Supreme Court.

After the trial but prior to argument on appeal this Court decided *Ballew v. Georgia,* 435 U.S. 223, 98 S. Ct. 1029 (1978), holding that a criminal trial in a non-petty case to a jury of only five persons deprives the accused of his right to trial by jury. This holding was urged by defendants on appeal before the Louisiana Supreme Court. That Court, holding that Defendants' contentions alleged error patent on the face of the proceedings (Appendix, Petition for Certiorari, p. 12a), considered on its merits the contention of the unconstitutionality of a non-unanimous verdict by a six-person jury. The Court held that, though the issue was close, it would "indulg[e] in the presumption of federal constitutionality which must be afforded to provisions of our state constitution . . ." (Appendix, Petition for Certiorari, pps. 14a, 15a), and held that petitioners' federal constitutional rights had not been violated.

SUMMARY OF ARGUMENT

The decision of the Louisiana Supreme Court upholding the validity of the Louisiana six person non-

unanimous jury in serious criminal cases is in error, because such a jury substantially endangers the constitutional requisites for juries set forth in *Williams v. Florida,* 399 U.S. 78 (1970) and *Ballew v. Georgia,* 435 U.S. 223 (1978).

In *Ballew,* this Court listed several "concerns" which militated against the constitutional validity of the five member unanimous jury in Georgia. Among those concerns were that a jury that small, even though requiring a unanimous verdict, did not assure a fair possibility for representing a cross section of the community and endangered effective group deliberation. Further, a jury that small created an imbalance detrimental to the defense.

The constitutional invalidity of a five member panel cannot be cured by adding another person to the jury as long as that sixth member's vote is not required in order to return a verdict. The combination of non-unanimity and reduced panel size violates the original theories leading to findings that the deviations from the traditional twelve member unanimous model were justified.

These conclusions are compelled both by social science data compiled since *Williams v. Florida* was decided in 1970 and by common sense. An example of such a common sense conclusion is that a defendant's chances for a hung jury under the Louisiana system are less than under the Georgia system condemned in *Ballew,*

because whereas Georgia required all five jurors to concur Louisiana requires only that five of six jurors agree.

No state interest counterbalances or justifies the threat to the right to a jury trial inherent in the Louisiana non-unanimous reduced panel model. All six jurors must still be paid and the money saved by shortened jury deliberation periods and fewer retrials resulting from fewer hung juries does not justify the threat to the sixth amendment right to a trial by jury.

ARGUMENT

Prior to 1974 Louisiana law provided for a jury of five for lesser felonies, with a requirement for a unanimous verdict. The law then was substantially similar to the Georgia jury provision invalidated earlier this year by this Court in *Ballew v. Georgia*, 435 U.S. 223, 98 S. Ct. 1029 (1978). The new 1974 Louisiana constitution changed this requirement by adding a sixth juror, though requiring that only five must concur to render a verdict. Article I, Section 17. It is submitted that the principles and considerations which caused this Court to invalidate the Georgia jury provision in *Ballew* apply with equal if not greater force to the Louisiana provision for a non-unanimous six-person jury.

In *Williams v. Florida*, 399 U.S. 78, 90 S. Ct. 1893 (1970) this Court held that a six-man jury did not violate Sixth Amendment rights, because such a jury should

probably be large enough to promote group deliberation and should provide a fair possibility for obtaining a representative cross-section of the community. The Court stated:

> "But we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers twelve — *particularly if the requirement of unanimity is retained.*" (emphasis added)
>
> 90 S. Ct. 1893, at 1906

In Louisiana, since unanimity is not required in a six-man jury, the question arises as to whether the goals mentioned by this Court will be met by permitting conviction upon the agreement of five of the six jurors.

I.

A Non-Unanimous Six Person Jury Presents A Substantial Threat To The Right To Trial By Jury, Because The Reduction Of The Size Of The Voting Majority Required To Reach A Verdict To A Number Below Six Endangers A Fair Possibility For Representing A Cross Section Of The Community And Endangers Effective Group Deliberation.

This Court has held that criminal convictions are constitutionally permissible when rendered by both

non-unanimous twelve person juries, *Johnson v. Louisiana*, 406 U.S. 356 (1972); *Apodaca v. Oregon*, 406 U.S. 404 (1972), and six-person unanimous juries, *Williams v. Florida*, 399 U.S. 78 (1970), yet invalid when rendered by unanimous five person juries, *Ballew v. Georgia*, 435 U.S. 223 (1978). It is submitted that the invalidity of a five person unanimous panel cannot be cured by adding another person to the jury without insuring that the contributions of the additional member will be manifested in the final verdict that emerges from the deliberative process.

During the eight year period between *Williams v. Florida* and *Ballew v. Georgia*, reams of social science data had been compiled comparing and contrasting various attributes of six and twelve person juries. In announcing the judgment of the Court in *Ballew*, Mr. Justice Blackmun reviewed many of the findings of this empirical research. Included among these were the following:

1. Recent empirical data suggest that as juries become progessively smaller, they are less likely to promote effective group deliberation, which eventually leads to inaccurate factfinding and incorrect application of community common sense. 98 S. Ct. at 1035.

2. Current data raise doubts about the ability of smaller juries to determine accurate results. 98 S. Ct. at 1036. For example, the risk of convicting an innocent person increases as the size of the jury diminishes. 98 S.

Ct. at 1036, noting Friedman, *Trial by Jury: Criteria for Convictions, Jury Size and Type I and Type II Errors*, 26-2 Am. Stat. 21 (April 1972) and Nagel & Neef, *Deductive Modeling to Determine an Optimum Jury Size and Fraction Required to Convict*, 1975 Wash. U.L.Q. 933.

3. The data suggest that as juries become smaller, there is greater variance in verdicts, amounting to an imbalance detrimental to the defense. 98 S. Ct. at 1037. For example, the frequency of hung juries decreases when juries are reduced in size. 98 S. Ct. at 1037, citing Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U.Chi. L. Rev. 710 (1971) and Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 Mich. L. Rev. 643 (1975) [hereinafter cited as Lempert].

4. Because minority representation diminishes as jury size decreases, the Court stated that this trend "foretells problems not only for jury decisionmaking, but also for the representation of minority groups in the community." 98 S. Ct. at 1037, citing Lempert.

Mr. Justice Blackmun concluded that "(A)ny further reduction that promotes inaccurate and possibly biased decisionmaking, that causes untoward differences in verdicts, and that prevents juries from truly representing their communities, attains constitutional significance." *Ballew v. Georgia*, 435 U.S. 223, 98 S. Ct. 1029, 1039 (1978).

The significant feature of petitioners' case, unique among the cases heretofore discussed, is the combination of non-unanimity and reduced panel size. It is submitted that the application of the non-unanimity feature in the six member panel context violates the original theories leading to the findings of permissibility of the reduced jury size and the abandonment of the unanimity requirement. The justifications for each of these deviations from the traditional twelve member unanimous model are mutually exclusive, but fail when applied in unison.

A. The Louisiana Panel Endangers Adequate Jury Deliberation

The Court's first concern in *Ballew* was that a change in the number of jurors should not affect the group's method or manner of discussion. 435 U.S. at 232. *Ballew* concluded that six is the least possible number of jurors necessary for effective group deliberation when the product of the deliberative process must be a unanimous verdict. 435 U.S. at 240. If sequestering six jurors until unanimous agreement is reached is the bare minimum for insuring effective and meaningful group deliberation, abolishing the unanimity requirement in this context means that the lowest standard is no longer met. This is the necessary conclusion unless one accepts the suggestion that there is absolutely no difference in the intensity of the debate that must persuade six out of six as contrasted with five out of six jurors. This assertion is certainly contrary to a normal

expectation of human behavior. See: dissent of Mr. Justice Douglas in *Johnson v. Louisiana*, 406 U.S. at 389.

Moreover, recent empirical studies have demonstrated the impact the removal of the unanimity requirement has on jury processes. A comparison of the deliberation times between mock juries required to act unanimously and those required to act by two-thirds vote showed deliberation times were expedited when unanimity was not required. Davis, et al., *The Decision Processes of 6- and 12-Person Mock Juries Assigned Unanimous and Two-Thirds Majority Rules*, 32 J. Pers. and Soc. Psych. 1 (1975). These findings suggest that only a limited consideration may be given to dissenting views if those viewpoint holders are not necessary for the group's verdict. *Id.* at 12.

Empirical evidence has also shown that the keen analysis which should be given to all viewpoints during jury deliberation is likely to be substantially less when an opinion is expressed by only one member of a group than when the same viewpoint is expressed by two members of the group, even if the absolute group size is doubled. Therefore, when the Louisiana Supreme Court argues that "If 75 percent concurrence (9/12) was enough for a verdict as determined in *Johnson v. Louisiana*, 406 U.S. 356, [92 S. Ct. 1620, 32 L.Ed.2d 152] (1972), then requiring 83 percent concurrence (5/6) ought to be within the permissible limits of Johnson," *State v. Wrestle, Inc., et al.*, 360 So.2d 831, 838; p. 13a, Appendix, pet. for cert., it ignores this fact.

A mere comparison of percentages, with nothing more, overlooks a fundamental distinction between the two variations. The distinction arises because of the psychological evidence that demonstrates the importance to the proponent of a minority viewpoint of having at least one ally when presenting his arguments to the majority. Lempert, *Id.* at 674. Beginning with the Asch experiments reported in the 1950's (Asch, *Effects of Group Pressure Upon the Modification and Distortion of Judgments*, in *Group Dynamics* 189 (2d ed. D. Cartwright & A. Zander, 1960), it has been shown that the likelihood of a sole dissenter maintaining his or her position in the face of a substantial majority opposed to his view is slim at best. See Lempert, *Id.* at 674-78; Saks, *Ignorance of Science Is No Excuse*, 10 Trial 18, 19 (Nov.-Dec. 1974).

Even if the minority viewholder maintains a contrary view, a grave danger exists that when faced with the majority view, this sole dissenter will change his overt opinion so as to avoid appearing different. When the dissenter has at least one ally, however, "the conformity rates . . . fell off dramatically, even though the subjects continued to face absolutely large majorities against them." Lempert, at 674. If the minority view is held by only one out of six jurors, as opposed to two or three out of twelve jurors, a grave danger exists that the rationale of the minority viewpoint will not be fully and effectively presented to the majority viewholders.

B. *The Louisiana Panel Creates an Imbalance Detrimental to the Defense*

An additional concern expressed by Mr. Justice Blackmun in *Ballew* was the danger in reducing the size of the jury that the chance for hung juries would decline, thus creating "an imbalance to the detriment of one side, the defense." 435 U.S. at 236. The data the Court relied upon to demonstrate the lesser chance for a hung jury that results if the number of jurors was reduced below six even more strikingly demonstrates the danger that occurs to an accused's chance for a hung jury when the requirement of unanimity is removed from the six member panel. See Lempert, at 676-77; Zeisel, *And Then There Were None: The Diminution of the Federal Jury*, 38 U.Chi. L. Rev. 710, 719-20 (1971); Note, *The Effect of Jury Size on the Probability of Conviction: An Evaluation of Williams v. Florida*, 22 Case W. Res. 529, 547 (1971); see generally H. Kalven & H. Zeisel, *The American Jury* at 453-63 (3d ed. 1966). If five out of five does not offer sufficient protection for an accused, five out of six offers him even less protection.

C. *The Louisiana Panel Adversely Affects Minority Representation*

Finally, it is submitted that the requirement enunciated in *Williams v. Florida*, 399 U.S. at 100, that a verdict be rendered by a jury composed of a representative cross section of the community is thwarted if non-unanimity is permitted on the six member jury panel.

The Court in *Ballew* concluded that the opportunity for meaningful representation of minority groups is decreased below the constitutional minimum when the jury is composed of only five members. 435 U.S. at 236-37, 238; see also, opinion of Mr. Justice White concurring in *id.* at 245. If the jury's verdict is concurred in by only five jurors and these five members could not render a constitutionally valid verdict if acting alone because they do not provide a fair possibility for obtaining a representative cross section of the community, the addition of a sixth non-mandatory vote on the panel will likely not improve it. At the very least, permitting non-unanimity in this context creates some uncertainty as to whether the essential purposes behind the cross sectional requirement are being fulfilled or whether minority representation is merely a meaningless and empty formality. As Mr. Justice Stewart stated in his dissent in *Johnson v. Louisiana:*

> For only a unanimous jury so selected [i.e., by an impartial system] can serve to minimize the potential bigotry of those who might convict on inadequate evidence, or acquit when evidence of guilt was clear . . . . The requirements of unanimity and impartial selection thus complement each other in ensuring the fair performance of the vital functions of a criminal court jury.
>
> 406 U.S. 398

It should be noted that there may be no minority representation at all on a six person jury. Mr. Justice Blackmun pointed out that if a minority viewpoint is shared by 10% of the community, over half of six member juries will statistically have *no* minority representation. *Ballew v. Georgia*, 98 S. Ct. at 1037. Thus, even the one non-mandatory dissenter, referred to by Mr. Justice Marshall as a "surplusage" member, *Johnson v. Louisiana*, 406 U.S. at 400-01, may not be present to try to persuade the five person majority to consider minority views.

An additional consideration affecting the cross sectional requirement in this case is the nature of the charge, obscenity, based upon the display of films presumptively protected by the First Amendment. In *Miller v. California*, 413 U.S. 15 (1973), this Court eliminated the requirement for national standards and adopted the view that obscenity should be determined by local community standards as viewed by the average person. The purpose of this standard was stated by the Court to be that:

> "So far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person — or indeed a totally insensitive one."
>
> 413 U.S. at 33

The Court in *Miller* made clear that the lay jurors, as ultimate factfinders, could rely upon their own experience in determining what was obscene. The necessity for obtaining an adequate cross section of the community is thus heightened in obscenity cases in order to obtain a more reliable reflection of the views of the "average person" in the community rather than particularly susceptible or totally insensitive citizens.

For the foregoing reasons, it is submitted that the application of the principles set forth in *Ballew v. Georgia* invalidates the Louisiana six person non-unanimous jury in serious criminal cases.

II.

No State Interest Counterbalances Or Justifies The Substantial Threat To Sixth And Fourteenth Amendment Guarantees Resulting From The Louisiana Six Person Non-Unanimous Criminal Jury.

Mr. Justice Blackmun indicated in *Ballew* that even if a given change in the structure of the jury "inhibits the functioning of the jury as an institution to a significant degree," that change may nevertheless be justifiable if "any state interest counterbalances and justifies the disruption so as to preserve its constitutionality." *Ballew v. Georgia*, 435 U.S. 223, at 231. No such state interest exists in this case.

The only monetary savings that could occur from use of the Louisiana six person jury would be either in the

area of shorter deliberation periods or in the reduction in the number of hung juries that result in the retrying of cases. However, as has been discussed earlier, either one of these situations greatly endangers important sixth amendment values. Therefore, any potential savings that could result from the five out of six jury verdict model are greatly outweighed and counterbalanced by competing considerations that are essential to the proper functioning of the jury.

CONCLUSION

This Court should declare those provisions of Article I, Section 17 of the Louisiana Constitution of 1974 which provide for a non-unanimous jury of six members to be in violation of the right to trial by jury protected by the Sixth Amendment to the United States Constitution. The convictions of petitioners Daniel Burch and Wrestle, Inc. should be reversed and the case remanded to the Supreme Court of the State of Louisiana.

Respectfully submitted,

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CERTIFICATE

I hereby certify that I have served three copies of the foregoing brief for the petitioners upon respondent herein, the State of Louisiana, by personally handing the copies of said brief to Louise S. Korns, Assistant District Attorney for the Parish of Orleans, State of Louisiana.

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